

STATE OF MICHIGAN
COURT OF APPEALS

MARY MARGARET McCABE,

Plaintiff-Appellant,

v

MILLER & ASSOCIATES, L.L.P.; IMHOFF &
ASSOCIATES, P.C.; MITCHELL H. NELSON,

Defendant-Appellees.

UNPUBLISHED

October 9, 2007

No. 275498

Oakland Circuit Court

LC No. 05-070747-NM

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

Plaintiff, Mary Margaret McCabe, appeals as of right the trial court's orders granting defendants' Miller & Associates, LLP, Imhoff & Associates, P.C., and Mitchell H. Nelson motion for summary disposition and denying plaintiff's request to file a first amended complaint. We affirm.

I. Background

Plaintiff was a social worker and psychologist licensed by the Department of Consumer and Industry Services, Board of Social Work. A former patient filed a complaint against her, and formal disciplinary action was instituted as a result of the former patient's allegations. Plaintiff responded by hiring defendants to represent her in the administrative hearing. An Administrative Law Judge (ALJ) concluded after a hearing that plaintiff had acted improperly because she failed to separate and maintain the boundaries between her professional and personal life with regard to her former patient. Consequently, the ALJ proposed revoking plaintiff's license.

After receiving the ALJ's final order, defendant Nelson, a defendant in the present case and plaintiff's attorney in the administrative hearing, notified her that he would not represent her on appeal. Defendants admit that they neither filed an appeal nor forwarded the necessary materials to plaintiff before the time for claiming an appeal had lapsed. While plaintiff and defendants agreed that the written agreement between them did not address defendants' obligation to continue its representation on appeal, the parties disputed whether defendants were obligated to pursue the appeal. Plaintiff retained new counsel to represent her on appeal, and the new counsel filed with this Court an application for delayed appeal, a motion to stay the ALJ's opinion, and a motion for immediate consideration.

On December 9, 2003, this Court granted plaintiff's motion for immediate consideration, and temporarily granted the motion for stay pending appeal until it reached a decision on the application for delayed appeal. On December 12, 2003, the Court denied the application for delayed appeal "for lack of merit in the grounds presented." *In re McCabe*, unpublished order of the Court of Appeals, decided December 12, 2003 (Docket No. 252587). Plaintiff's appeal to the Supreme Court was denied because the Court was not "persuaded that the questions presented should be reviewed" by the Court. *Dept of Consumer & Industry Services v McCabe*, 469 Mich 1022; 678 NW2d 440 (2004).

Plaintiff subsequently filed the current malpractice claim against defendants on March 6, 2005. As summarized by the trial court, plaintiff alleged that "defendants breached their duties to plaintiff by failing to (i) inform her that she had only 21 days from the date of the ALJ's decision to claim an appeal; (ii) advise her that she could ask for a stay of the sanction; (iii) timely file a claim of appeal; and (iv) timely turn over case related materials so plaintiff's successor counsel could file an appeal." Plaintiff also claimed that as a result of the alleged negligence, she lost her license to practice her profession, incurred legal expenses, and suffered emotional and mental distress.

On April 10, 2006, defendants moved for summary disposition, arguing that plaintiff could not prove defendants proximately caused her injury given the appellate court's denial of her appeal on the merits. The trial court scheduled a July 12, 2006, hearing for the motion, which was 27 days after the June 15, 2006, discovery cutoff date. Plaintiff was scheduled to depose defendant Nelson on June 22, 2006, but plaintiff accommodated defendant's scheduling conflict by changing the deposition to a later date. The parties agreed to conduct the deposition on August 11, 2006, one month after the trial court conducted the hearing on defendants' motion for summary disposition, and two months after discovery closed.

In July, defendants filed their second motion for summary disposition, with the trial court scheduling a September 6, 2006, hearing on the motion. Several days before the hearing, the trial court adjourned the hearing and on September 6, 2006, granted defendants' first motion for summary disposition. The trial court held that this Court's denial of plaintiff's delayed appeal on the merits in the prior case precluded plaintiff from proving the proximate cause element in the instant case. Plaintiff responded by filing a timely motion to reconsider the finality of the summary disposition order. Also pending before the court was a September 5 motion for leave to amend her complaint, which plaintiff had filed the day before the first summary disposition motion was decided. On December 22, 2006, the trial court issued its order denying both motions. Plaintiff now appeals as of right.

II. Standard of Review

An appellate court reviews a trial court's decision on a motion for summary disposition de novo. *Wortelboer v Benzie County*, 212 Mich App 208, 212; 537 NW2d 603 (1995). Likewise, this Court reviews a trial court's grant or denial of a motion to reconsider, and a decision on a motion for leave to amend the complaint, for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 650; 563 NW2d 647 (1997); *Ben P Fyke & Sons v Gunter Co.*, 390 Mich 649, 658; 213 NW2d 134 (1973).

III. Analysis

A. Defendants' Motion for Summary Disposition

As previously noted, the trial court granted defendants' motion for summary disposition on the ground that because this Court previously considered plaintiff's licensing appeal on the merits when it denied her prior delayed appeal, plaintiff could not prove the proximate cause element of her legal malpractice claim in the instant case.

In her appeal, plaintiff argues the rationale behind this Court's decision to deny plaintiff's application for delayed appeal is not clear and, therefore, the trial court improperly drew the inference that this Court denied the prior appeal on the merits. Furthermore, plaintiff contends that collateral estoppel does not apply to the instant case and the Court should apply the law of the case doctrine in analyzing the rejection of her prior appeal. And, plaintiff argues, the law of the case doctrine does not preclude her legal malpractice claim in the instant case.

To resolve the issue, we must first examine the elements of a legal malpractice action in general, and an appellate malpractice claim in particular. The elements of a legal malpractice action are: 1) the existence of an attorney client relationship; 2) negligence in the legal representation of the plaintiffs; 3) that the negligence was a proximate cause of an injury; 4) the fact and extent of the injury alleged. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). Additionally, with respect to the proximate cause aspect of a legal malpractice claim, the *Charles Reinhart* Court held that a plaintiff "must show that *but for* the attorney's alleged malpractice, he would have been successful in the underlying suit." *Id.* at 586, quoting *Coleman v Gurwin*, 443 Mich 59, 64; 503 NW2d 435 (1993). More specifically, in a legal malpractice action alleging negligence in an appeal, a plaintiff must also demonstrate the attorney's negligence caused the loss or unfavorable result of the appeal. *Id.* at 588.

Given the elements addressed above, the trial court correctly held that plaintiff could not establish that any negligence by defendants was the proximate cause of her injury. Plaintiff argues that defendants' negligence caused her to file an untimely appeal, and as a result of the delay, the appeal was rejected. In other words, the delay in filing, which she attributes to defendants' negligence, caused her to lose the appeal. However, the trial court properly held that this Court's denial of plaintiff's application for delayed appeal "for lack of merit in the grounds presented", was a decision on the merits, and was not a decision based exclusively on the fact that her appeal was untimely. As Judge Gage has noted, we have previously held that a denial of application for leave to appeal a non-interlocutory order for "lack of merit in the grounds presented" is a resolution of the legal grounds presented. See, *Beulah Missionary Baptist Church v Spann*, 132 Mich App 118, 126; 346 NW2d 911 (1984) (Gage, J., concurring in part), citing *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981). Although the reasons for the delay are certainly a permissible consideration when deciding the application, see MCR 7.205(F)(1), a denial for lack of merit in the grounds presented in the appeal is a rejection of the grounds for the appeal. *People v Wiley*, *supra*. Since this Court denied plaintiff's licensing case on the merits by denying her delayed appeal, she cannot establish that the delay resulting from defendants' inaction proximately caused her injury.

Plaintiff contends that *Beulah* and *Wiley* are inapplicable to the instant case because they dealt with the law of the case doctrine and not collateral estoppel. However, the principles in

Wiley are not dependant on it involving the law of the case or collateral estoppel. Instead, the cases acknowledge the overall legal principle, independent of the contexts in which they are stated, that a non-interlocutory order denied for lack of merit is a decision on the merits. Thus, because the Court previously determined that plaintiff's appeal lacked merit and therefore denied it, whether or not it was untimely was not controlling. With that ruling in place, it would be impossible for plaintiff to succeed on the proximate cause element of her legal malpractice claim. Accordingly, we affirm the trial court's order granting defendants' motion for summary disposition.

B. Plaintiff's Motion to File a First Amended Complaint

The trial court did not abuse its discretion when it denied plaintiff's motion for leave to file a first amended complaint. When a court grants a motion for summary disposition under MCR 2.116(C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified. MCR 2.116(I)(5). While leave to amend "shall be freely granted when justice so requires", the court may justifiably deny the motion for undue delay, prejudice, or futility. MCR 2.118(A)(2). *Weymers*, *supra* at 658. The decision to grant or deny a motion to amend is within the discretion of the court. *Id.*

The courts have consistently held that it is within a trial court's discretion to deny a motion to amend when it determines the motion was unduly delayed and would result in unfairly prejudicing the nonmoving party. *Weymers* is illustrative. In *Weymers*, the Supreme Court explained that "the trial court did not abuse its discretion in denying plaintiff's motion to amend because the amendment sought to introduce a new claim just before trial, after discovery had closed, and defendants demonstrated that they did not have knowledge that plaintiff was intending to rely on the new claim at trial." *Id.* at 666. Furthermore, the *Fyke* Court expounded that "litigation may proceed to a point where the opposing party cannot reasonably be expected to defend against the amendment; this is an especially pertinent factor on the eve of, during, or after the trial." *Ben P Fyke & Sons*, *supra* at 663.

The facts in the instant case indicate the trial court did not abuse its discretion when it found that plaintiff's motion to amend was unduly delayed and would have unfairly prejudiced defendants. This Court is sympathetic to plaintiff's counsel's contention that the motion was not unduly delayed because the basis for the new allegations could only be argued in good faith once plaintiff's expert witness, Burdick, had the opportunity to review all the pertinent records. Burdick's analysis was based in part on defendant Nelson's deposition, which was originally scheduled for June 22, 2006, but defendant had a conflict, and plaintiff graciously accommodated defendant by rescheduling the deposition for August 11, 2006. However, despite plaintiff's professional conduct and good faith argument, the fact remains that by the time plaintiff filed her motion to amend, discovery had been long concluded, a decision was pending on the dispositive motion, and that motion was actually decided the day after plaintiff's motion was filed. While plaintiff's reasons for filing her motion to amend on the eve of trial are understandable, given the advanced point in the litigation process and the high standard of review applied to a decision on a motion to amend, we are constrained to conclude that the court did not abuse its discretion when it denied plaintiff's motion.

We also cannot say that the trial court abused its discretion in denying plaintiff's motion on the grounds that granting the motion would have unfairly prejudiced defendants. As the *Weymers* Court explained "...a trial court may find prejudice when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after discovery is closed, just before trial, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial." *Weymers, supra* at 659-660. In the instant case, granting the motion would have forced defendants to defend against new claims of negligence long after discovery had closed and the summary disposition motion had been argued. Defendants could not reasonably be expected to defend themselves against plaintiff's new allegations so far into the litigation process and so close to the start of trial. The court was within its broad discretion to deny plaintiff's motion on the basis that it would have been prejudicial to defendants.

For the foregoing reasons, we hold the trial court did not err when it granted summary disposition in favor of defendants. We also hold that the trial court did not abuse its discretion when it denied plaintiff's motion to file her first amended complaint.

Affirmed.

/s/ Donald S. Owens

/s/ Christopher M. Murray